

**WOON HOE KAN & SONS SDN. BHD. v.
BANDAR RAYA DEVELOPMENT BHD.**

[O.C.J. (Harun J.) June 28, 1971]

[Kuala Lumpur — Civil Suit No. 153 of 1971]

*Practice and Procedure — Specially indorsed writ — Application for leave to sign final judgment — Triable issues in respect of one part — Leave to defend.**Contract — Engineering works — Engineers' certificate for payment — Delay — Interest.*

The plaintiffs by specially indorsed writ brought this action for \$860,165.17 for work done and for \$239,189.30 being interest for overdue payments. Relying on the terms of two contracts, the plaintiffs applied for leave to sign final judgment.

Held: (1) there was no triable issue to refuse leave to sign final judgment in respect of the claim for \$860,165.17;

(2) there was a triable issue with regard to the claim for interest;

(3) the plaintiffs were therefore entitled to leave to sign final judgment in the sum of \$860,165.17 and the defendants were entitled to unconditional leave to defend the claim in respect of interest.

Cases referred to:-

- (1) *Peninsular Land Development Sdn. Bhd. v. K. Ahmad* [1970] 1 M.L.J. 149, F.C.
- (2) *Dawnays Ltd. v. F.G. Minter & Trollope & Colls Ltd.* [1971] 1 W.L.R. 1205.

CIVIL SUIT.

Edgar Joseph Jr. for the plaintiff.

V. C. George for the defendants.

Cur. Adv. Vult.

Harun J.: This is an application by the plaintiffs for leave to sign final judgment in this action against the defendants.

The specially indorsed writ was taken out by the plaintiffs on March 17, 1971. It was served on the defendants on March 19, 1971 and on March 25, 1971 the defendants entered an appearance.

The plaintiffs on March 29, 1971 made this application in respect of:

- (i) \$860,165.17 for work done; and
- (ii) \$239,189.30 being interest for overdue payments.

The defendants by its secretary filed an affidavit in opposition to this application on June 7, 1971 wherein it is admitted that the sum of \$860,165.17 was certified as due to the plaintiffs under the relevant contracts but the defendants claimed that they were entitled to a set-off and counterclaim against the plaintiffs. The defendants further denied that there was any agreement to pay interest on overdue payments to the plaintiffs.

The facts giving rise to this action are as follows: By two contracts in writing, the first of which was dated July 5, 1966 known as Phase I and the second of which was dated July 7, 1967 known as Phase IV, the plaintiffs undertook, in consideration of the payment to them by the defendants of the respective contract prices specified therein, to carry out for the defendants certain civil engineering works in connection

A with the development of Bandar Raya adjacent to Jalan Bangsar, Kuala Lumpur.

Phase I consisted of earth-works; and

Phase IV consisted of earth-works, road and drainage works. In both contracts the defendants named Bailey and Partners as engineers for the contract. In both there was provision that the engineers would from time to time issue certificates for payment by the defendants to the plaintiffs for work done and in both it was provided that the defendants should pay to the plaintiffs the amount stated to be due to the plaintiffs in any such certificate within 14 days of the issuing thereof.

B The engineers issued these interim certificates from time to time but it is apparent that by early 1969 payments were slow although works continued to be done. By November 9, 1970 a sum of \$1,190,165.17 had been certified as due for payment. Towards this, the defendants made part-payments totalling \$330,000 to account leaving a balance of \$860,165.17.

C A large volume of correspondence was entered into between the parties regarding these payments from early 1969. There were meetings and conferences and the plaintiffs rendered monthly statement of accounts accompanied with demands for prompt payments. From the bulk of the correspondence it is apparent that both parties were short of funds. The plaintiffs had borrowed monies from other sources to complete the works and the defendants gave repeated assurances that they were about to come into funds. Both parties desperately made every attempt to maintain goodwill between the parties but it was obvious that the contractual arrangements whereby the defendants, as employers, were to pay the plaintiffs, as contractors, for works done on a monthly basis had completely broken down.

F Then further misfortune visited the project. There was erosion, silting-up of culverts and streams and flooding of roads and houses. On April 15, 1970 the defendants had to enter into an agreement with the Commissioner of the Federal Capital, Kuala Lumpur in the sum of \$410,000 for the purpose of desilting the Sungei Puteh and to prevent flooding of Lorong Ma'arof, Jalan Ma'arof and Jalan Bangsar areas which had been caused by the operations on the defendants' land. On June 8, 1971 Realty Development Corporation of Malaysia Bhd. obtained judgment in the High Court Kuala Lumpur (Civil Suit No. 22/71) against the defendants to prevent silting, erosion and do or restrain from doing such works on their land so as to affect the lands belonging to Realty Development of Malaysia. The defendants have also received letters from occupiers of neighbouring houses threatening legal proceedings for flooding and silting their houses.

G On December 4, 1969 the engineers issued two interim certificates for the release of half of the retention money in respect of both contracts and on September 9, 1970 the engineers issued two further interim certificates for the release of the other half of the retention money in respect of both contracts. On November 9, 1970 the engineers issued certificates in

respect of both contracts wherein the following sums were retained for "Third Party Liability":

Phase I	—	\$12,500.05
Phase IV	—	\$12,500.95

On November 20, 1970 the engineers issued maintenance certificates in respect of both contracts in the following terms:

"The period of maintenance having expired on 28th September, 1969 and since all the defects have been remedied satisfactorily, the works are therefore certified as completed and maintained satisfactorily in accordance with the terms and conditions of the contract."

Finally on April 13, 1971 the engineers issued a final interim certificate in respect of each contract whereby the retention money for third party liability was released.

The plaintiffs rely on clause 60 of the contract that payment must be made by the defendants within 14 days after the issue of each certificate by the engineers and that they are entitled to receive the \$860,165.17 forthwith.

The defendants contend that they are entitled to withhold payment and rely on clause 22 which provides for indemnity by the contractors (the plaintiffs) against third party claims. In support of this contention they point to their liability to pay \$410,000 to the Commissioner of the Federal Capital and to remedial expenditures incurred consequent to judgment being entered against them by Realty Development Corporation of Malaysia Bhd.

The question is whether there is a triable issue to prevent leave being granted to sign final judgment: see *Peninsular Land Development Sdn. Bhd. v. K. Ahmad*.⁽¹⁾ The issue depends on the true construction of the two contracts, the material provisions of which are identical for the purposes of this case. Looking at the contract as a whole, it is clear that it was the intention of the parties that the contractors were to carry out civil engineering works to the satisfaction of the engineer appointed by the employers. Before the end of each month the contractors were to submit to the engineer a statement of the estimated contract value up to date. The engineer was to issue a certificate of permanent work done as he considers reasonable subject to a retention as stated in the conditions of the contract. The employers were to pay the contractors the sum certified within 14 days of the issue of such certificate. This is the normal arrangement for such contracts. Contractors rely on these progress payments to get on with their work. Without these financial arrangements, contractors will be put out of business. Then there are provisions protecting each other's interests, indemnity clauses, insurance clauses and the arbitration clause in the event of dispute. The contract can therefore, be divided into two main parts viz: (a) prompt progress payment for work done and (b) the obligations of the parties under the other provisions of the contract. Payments under the first part are therefore independent of claims arising out of the second part. The claim here is in respect of progress payments and the defendants have no

A right to withhold payment because of claims arising under the second part.

A similar problem arose in the recent English Court of Appeal case of *Dawnays Ltd. v. F. G. Minter & Trollope & Colls Ltd.*,⁽²⁾ where Lord Denning M.R. said:

B "An interim certificate is to be regarded virtually as cash, like a bill of exchange. It must be honoured. Payment must not be withheld on account of cross-claims whether good or bad except so far as the contract specifically provides".

C There are specific provisions in this contract where the defendants are entitled to withhold payment but a claim under clause 22 is not one of them. The only grounds on which the defendants oppose this application arise under clause 22, and I therefore hold that there is no triable issue to refuse leave to sign final judgment in respect of the claim for \$860,165.17. The defendants should seek their remedy under clause 22 in separate proceedings.

D The claim for interest, however, is another matter. The plaintiffs had written a letter claiming interest at a certain rate for overdue payments. The defendants in their reply appear to have agreed to pay interest but did not specify the rate. The monthly statement of accounts stated a different rate of interest. There is no provision in the contract for the payment of interest in the event of delayed payments. The defendants now deny that there was any promise or agreement to pay any interest whatsoever. In the circumstances I hold that there is a triable issue with regard to the claim for interest.

F The plaintiffs are given leave to sign final judgment in the sum of \$860,165.17. The defendants are given unconditional leave to defend the claim in respect of interest. The defendants are to pay the plaintiffs the costs of this application.

Order accordingly.

Solicitors: Joseph & Son; Ng Ek Teong & Partners.

G

OTHMAN & ANOR. v. MEK

[O.C.J. (Wan Suleiman J.) July 5, 1971]

[Alor Star — Civil Suit No. 68 of 1968]

H *Practice and Procedure — Pleadings — Whether frivolous or vexatious — Striking out — Point of law — R.S.C. 1957, O. 25, rr. 2 and 4.*

Evidence — Plea of res judicata — When applicable.

I In 1958 one Haji Ahmad bin Haji Yusof sued the defendant herein as administratrix of the estate of one Man bin Haji Sa'ad, deceased, claiming specific performance of an agreement to transfer back $\frac{1}{4}$ share of certain lands comprised in two Surat Putus. Judgment was at first given in his favour but on appeal (*Mek v. Haji Ahmad* [1960] M.L.J. 133) the Court of Appeal held that his claim was statute barred. Haji Ahmad died in 1963 and letters of administration were taken out by the present plaintiffs. They sought a declaration that half of the undivided shares in the two pieces of land concerned in the 1958 suit was held by the defendant as constructive trustee for the estate of Haji Ahmad and secondly for an order for transfer of the two half undivided shares to